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ABSTRACT

This paper is a summary of a comprehensive work on the legal, social, educational, and political history of lesbian and gay teachers in U.S. society from colonial times to the present. Case law on homosexual educators is discussed, as are three major political campaigns that sought to prohibit homosexual conduct, activity or advocacy by school employees. Following a previously invisible, often depressing history of homosexual educators, remarkable advances have been made by lesbians and gay men in the past 20 years. Further research and education in this important area of social policy is needed. (DB)

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THE HOMOSEXUAL EDUCATOR: PAST HISTORY/FUTURE PROSPECTS

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THE HOMOSEXUAL EDUCATOR: PAST HISTORY/FUTURE PROSPECTS

Karen M. Harbeck, Ph.D., J.D.[1]

Introduction

Although society has been confronted with the issue of the homosexual school teacher since Socrates educated the youth of Greece, little is known about this often invisible but highly emotionally arousing educational/social concern. Prior to World War II, numerous cultural, legal, and educational factors combined to support the power of school administrators in the firing of a lesbian or gay teacher. Homosexuality was considered to be innately evil; teachers were required to be role models of exemplary behavior; school administrators had almost unrestricted power in hiring and retention decisions; and, the cost of litigation was prohibitive to the individual who might have considered rising above their own condemnation and that of society's to argue his or her right to remain an educator. Since the late 1940's, however, social and legal consensus on the definition of "immoral" conduct has broken down in the face of changing sexual mores, expanding personal freedoms, and the emerging political identity of lesbians and gay men. Through the collective power of teachers' unions, special interest litigation organizations, and the gay and lesbian rights movement, a challenge has emerged within a debate

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rights movement, a challenge has emerged within a debate that one California gubernatorial candidate characterized as "the hottest social issue since Reconstruction."[2] This paper is a brief summary of my 550 page book on the legal, social, educational, and political history of lesbian and gay teachers in American society from colonial times to the present.[3]

With the advent of computer data retrieval, it was possible to go back through the legal case law archives from the 1700's to the present and gather hitherto "lost" determinations of litigation concerning homosexual educators (approximately fifty cases) employed in all levels of instruction, elementary through university. A framework emerged of changing social and legal attitudes about homosexuality and teachers' rights that serves as the backbone of this historical interpretation. These legal opinions, however, were devoid of any contemporaneous community action or political controversy that might have been the catalyst of the legal struggle. For example, none of the opinions on homosexual teachers since 1969 mention the birth of the lesbian and gay rights movement, despite a very evident attitudinal change by the judiciary towards

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[2] State Senator John Briggs, quoted in Ellen Goodman, "Proposition Fever," The Boston Globe, 28 September 1978.

[3] Karen M. Harbeck, Personal Freedoms/Public Constraints: An Analysis of the Controversy Over the Employment of Homosexual as School Teachers, Vols. I and II, Doctoral Dissertation, Stanford University, 1987.

homosexuality. In an attempt to resolve these deficiencies, I corresponded with as many attorneys and clients involved in the litigation as was possible from the 1950's to the present. The documentation and recollections gathered from these men and women added a rich texture to the stories prejudicially detailed in the case law.[4] Furthermore, through an analysis of newspapers, articles, and interviews with politicians, political advocates, teachers' union leaders, and school personnel, the legal framework could be

[4] With respect to minority issues and social controversy, reliance on judicial opinions provides a biased perspective on emergent legal rights and changing social opinion. For example, most attorneys commence their legal analysis and court trial briefs on the dismissal of a homosexual educator with the Sarac case which was decided in 1967. (Sarac v. State Board of Education, 249 Cal. App.2d 58; 57 Cal.Rptr. 69 (1967).) In that case the judge wrote a very vehement opinion stating that homosexuality was "contrary and abhorrent" to society, so the Board of Education in the State of California had a right to revoke Sarac's life teaching credentials because of his conviction for public solicitation of lewd acts (soliciting sex and fondling the genitals of a police officer in a public men's room in Long Beach). The court opinion suggested that Sarac was caught in a flagrant crime, that he was a poor teacher, that no one appeared on his behalf, and that he had engaged in numerous homosexual encounters. Under these extreme circumstances, in fact, one might wonder why Sarac even attempted to challenge his dismissal. Recent correspondence with Sarac's attorney, Norman G. Rudman, portrays a very different scenario of a slightly effeminate, Yugoslavian, who walked into a public restroom and was arrested for solicitation. Although Sarac's wife, his family, and dozens of his colleagues and supervisors at his school testified in his behalf, they were powerless against the judge's personal abhorrence of homosexuals. Decades later, Attorney Rudman expressed frustration about the "miscarriage of justice," the "sanctimonious" decision of the court, and its longevity of its influence in the face of a lack of a mechanism for the presentation of Sarac's side of the story. (Personal correspondence with Sarac's attorney, Norman G. Rudman, 20 February 1986.)

interwoven with a social history of specific community events and attitudes. Three major political campaigns were the major focus: Anita Bryant's "Save Our Children" campaign in Florida (1977), California's "Proposition Six" Initiative (1978), and the Oklahoma State law (1978-85) that prohibited homosexual conduct, activity, or advocacy by school employees. Each of these conservative campaigns was a reaction to the increased legal and social acceptance of the homosexual educator that has occurred since 1969.

The impetus for this research was my personal quest as a homosexual educator, attorney, and social historian, to address the meager but overwhelmingly negative information about our history and our legal rights.[5] Although the

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[5] An assessment of contemporary educational law and policy textbooks revealed an astounding lack of even the smallest references to homosexual educators. Clearly the legal ramifications for, and the contributions of, lesbians and gay men to the history of employment rights and teachers' rights has been totally ignored. For example, no textbook credits litigation by homosexual teachers in Florida in the 1950's with a major test case that upheld the requirement of school board compliance with established state teacher dismissal procedures. These individuals were illegally purged from their jobs during a state-wide hunt for Communists who supposedly had infiltrated the schools to inculcate homosexuality and Communism in the nation's youth. (See William Neal v. Farris Bryant, et al.; Mary Frances Bradshaw v. State Board of Education; and Anne Louise Poston v. State Board of Education, Fla., 149 So.2d 529 (1962). Similarly, with the Morrison decision in 1969, involving homosexual activity by an educator, the California State Supreme Court articulated a standard concerning the relationship between private action and job-related constraints that remains as the landmark decision in employment restrictions within any profession. (Marc Morrison v. State Board of Education, 74 Cal.Rptr. 116; 1 Cal.3d 214; 461 P.2d 365; 82 Cal.Rptr. 175 (1969).)

addition of case law information provided in this study is significant, possible the larger contribution rests in its interdisciplinary analysis of social events that occurred in concert with the litigation.[6] This newly integrated information provides a rather radical departure from the previously invisible, often depressing history of homosexual educators. It stands as a documentation, and a declaration, of remarkable advances made by lesbians and gay men in the past twenty years. Resources, such as this study, become mechanisms for educating ourselves, so that each of us in our differing roles as school administrators, teachers, attorneys, legislators, judges, parents, and students, can bring greater clarity and fairness into our social policy considerations.

Past History

At present, there are approximately 2,404,000 teachers employed in the United States in public and private elementary and secondary settings alone.[7] Using Kinsey's outdated but often quoted estimate of 10 percent (recent

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[6] In the interest of brevity, I have presented an overview of this broader social/legal history, but I refer the reader to the footnotes and original text for more extensive documentation and analysis.

[7] Data obtained from Digest of Educational Statistics, 1983-84, National Center for Education Statistics, U. S. Department of Education: 11, 12, 50. Because of the publishing schedule, the numbers referenced above pertain to 1982 data. The reader also should be warned that national census data on teachers varies based upon the data gathering assumptions of each government agency.

estimates approach twenty percent), there are at least 240,400 homosexual educators currently employed in schools around the nation -- a number equal to the entire teaching staff of the States of California and Washington combined.[8] Another way to look at this figure is to realize that if the national average of number of teachers in every school is 23.4, then it is statistically likely that two or more educators per school are homosexuals.[9] In fact, the numbers may be much higher in light of the lesbian and gay rights movement that occurred after the original 1948 estimate of the homosexual population, and because teaching is an occupation that historically has attracted single women and non-traditional men.[10]

Although the number of lesbians and gay men in American education has been numerically significant, the details of their professional and personal experiences remain relatively unknown. For example, all of the

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[8] Estimates of the current number of homosexual men and women in the United States range from 3 to 30 percent. Kinsey's 1948 estimate of 10 percent is still quoted widely, although it predates the emergence of visible, political homosexual subcultures, so 18 percent may reflect a more accurate estimate.

[9] Numbers calculated by dividing the total number of teachers (2,404,000) by the total number of public and private elementary and secondary schools in the country (102,699). Data obtained from Educational Statistics: 11.

[10] For example, a 1975 estimate in San Francisco suggested that over one-third of the district's 4,400 teachers were homosexual. ("National Enquirer Equates Mass Murder and Gay Teachers," Seattle Gay News, 2 February 1979.

contemporaneous critiques of the institutional role of homosexuality in education were from other cultures. Xenophon discussed pederasty in ancient Sparta's educational system,[11] and eighteenth century legal theorists, Montesquieu and Beccaria, argued that the death penalty was too severe a punishment for an activity that was fostered by educational systems that segregated boys in same sex schools.[12] Similar critiques of the British boarding school system are available from the early 1800's to the present.[13]

In terms of an individual's experience, we do know that since colonial times the most common scenario is one of a person living an exemplary life in fear of discovery. In that rare instance when his or her homosexual orientation became known, the teacher quietly resigned or quickly left town, since the potential consequences of challenging the system alone were extreme. At various times in history, homosexuality has been perceived as a sin, a mental disorder and/or a criminal activity. Numerous social and legal

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[11] Xenophon, Lacedaemonians 2, 13, E. C. Marchant, trans., London: William Heinemann (1956). See also, Henri Marrou, "Pederasty In Classical Education," in A History of Education In Antiquity, George Lamb, trans., Madison, WI: University of Wisconsin Press (1948): 31.

[12] Louis Crompton, "Homosexuals and the Death Penalty in Colonial America," 1 (3) Journal of Homosexuality (1976): 282-285.

[13] Vern L. Bullough, "Homosexuality and the Medical Model," 1 (1) Journal of Homosexuality (1974): 99 - 110. See also, C. S. Lewis, Surprised by Joy: The Shape of My Early Life, New York: Harcourt, Brace and World (1955): 88-89, 108-110.

restrictions have been placed on homosexual behavior, and the consequences of infractions at times have been as severe as execution or imprisonment. Furthermore, having been socialized in this culture, lesbian and gay persons often have incorporated a negative self-image. Thus, remaining invisible and not challenging the status quo were reasonable responses in the face of personal danger and financial ruin.

One highly promising method of information retrieval involved cross-referencing book details on notable American teachers with those on homosexuals in history.[14] Preliminary research suggests that the mid-nineteenth century American transcendentalists provide a rich point of departure. Margaret Fuller, Ralph Waldo Emerson, Elizabeth Peabody, Henry David Thoreau, Amos Bronson Alcott, Herman Melville, and Walt Whitman all seem to have been educators with strong same-sex affiliations, although little material is available concerning a nexus between their same-sex commitments and their careers in teaching. The most direct evidence to date concerns Amos Bronson Alcott, father of the writer Louisa May Alcott, who apparently was involved with

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[14] Such as Abraham Blinderman's volumes on American writers in education, with Jonathon Katz's work on gay and lesbian history. Blinderman, American Writers on Education, Vols. 1 and 2, Boston: Twayne Publishers (1975, 1976). Katz, Gay American History: Lesbians and Gay Men in the U.S.A., New York: Thomas Y. Crowell (1976).

the British educator, Charles Lane.[15] Unfortunately, this focus on notable Americans fails to address the life experiences of "average" individuals who comprise the vast number of homosexual men and women in the teaching profession and about whom we currently lack oral or written history.

Similar information is missing from the case law context because homosexuality historically has been referred to in English and American law as a "crime against nature not to be named among Christians."[16] Thus, it often has fallen under vague criminal statutes concerning "open and gross lewd conduct" or "lewd vagrancy," and the specific case details have been obfuscated. Since computer informational retrieval relies on word recognition, this total lack of references to homosexuality make it difficult to retrieve cases prior to World War II. By the mid-1940's, however, social/legal conflict over homosexuality begins to emerge from the closet, as lesbians and gay men gravitate towards cities and establish increasingly visible communities, and school administrators struggle to control the definition of immorality in a changing society.

In his excellent book on the history of the emergent

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[15] Madelon Bedell, The Alcotts: Biography of a Family, New York: Clarkson N. Potter, Inc. (1980): 17, 18, 175, 180, 189, 208, 227-230.

[16] See William Blackstone, Commentaries on the Laws of England, London: William Reed (1811): 215.

homosexual political identity, John D'Emilio provides an extensive discussion on post-World War II America's response to homosexuality.[17] Increased prosecutions for consensual homosexual conduct, police raids, surveillance of gay bars and private homes, blackmail, and postal authority investigations, suggest a heightened concern about an increasingly visible social phenomena. Furthermore, Senator Joseph McCarthy's witch-hunting tactics successfully linked homosexuality and Communism in the minds of most Americans.

On the other hand, there are hints of changing social mores, as evidenced by the American Law Institute's 1955 Model Penal Code recommendation that all forms of sexual activity between consenting adults be legalized.[18] Although all of the states initially rejected the Model Penal Code reforms, there seems to have been increased concern for the procedural rights of criminals, and a growing sympathy towards persons accused of victimless crimes. I would argue that this heightened social conflict very quickly entered the educational realm, and that for the first time in American social history, the judiciary broke with educational policy concerning immorality, criminal conduct,

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[17] John D'Emilio, Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940-1970, Chicago: University of Chicago Press (1983).

[18] D'Emilio, Sexual Politics (1983): 112. See also, Walter Barnett, Sexual Freedom and The Constitutionality of Repressive Sex Laws, Albuquerque, NM: University of New Mexico Press (1973).

and the extent to which someone should be punished for consenting sexual activity outside of marriage. Because of increased judicial leniency and concern for procedural protections, school administrators faced the loss of one of their most reliable mechanisms for gathering information about the private behavior of teachers. Since any criminal conviction had served previously as the basis for dismissal on grounds of immoral conduct and unfitness to teach, the judiciary's change of attitude threatened to upset the balance of power for school administrators.

In response to these changes, lobbyists in California in the early 1950's successfully sponsored two new pieces of legislation designed to crack down on teachers treated leniently in the criminal justice system. Penal Code Section 291, required police officials to notify local boards of education whenever a teacher was detained or arrested in a criminal matter. Education Code Section 12756 permitted the immediate suspension of teaching credentials if an educator was convicted of any one of several statutes pertaining to sex and morality. This presumption of guilt streamlined the administrative process in the educational setting by automatically providing the grounds for teacher dismissal. It also set the stage for legal conflict between increasing criminal protections and constricting educational employment rights. Thus, the typical case scenario concerning a homosexual educator from the 1940's to the late

1960's, involved a male school teacher arrested in a public restroom for lewd acts. After successfully defending himself in the criminal sphere, he nevertheless faced dismissal from his teaching position because the illegally gathered information could be used against him, or because merely being involved in a criminal situation served as sufficient evidence of a tainted reputation and loss of credibility as an effective role model and educator. Since homosexuality remained a criminal offense, and since the state legislatures of at least California and Florida had specifically empowered school officials to abrogate personal employment rights for the welfare of the children, school boards still enjoyed extensive power over hiring and retention. Nevertheless, persons accused of criminal homosexual activity were successful in their job retention challenges if they were able to demonstrate some unconstitutional infringement on their procedural rights. For example, in the Fountain and Lerner cases it was successfully argued that the 1954 California reporting statute could not be applied retroactively against persons who had come under scrutiny for criminal behavior in the late 1940's.[19] Similarly, the Florida cases involving the McCarthy-like witch-hunt for lesbian and gay teachers upheld

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[19] George Fountain v. State Board of Education, 157 C.A.2d 463; 320 P.2d 899 (1958). See also Lerner v. Los Angeles City Board of Education, 59 C.2d 382; 29 Cal.Rptr. 657; 380 P.2d 97 (1963).

state teacher dismissal procedures, even though the State Board of Education was instructed to remove the allegedly homosexual educators through legal means.[20]

By 1969 the case law on homosexual educators demonstrates a clear recognition of changing social and legal attitudes. The California State Supreme Court's decision in Morrison v. State Board of Education called for an extensive analysis of the individual's behavior in relation to his or her job responsibilities before employment dismissal was possible. Furthermore, the Court announced that the status of being a homosexual was insufficient grounds for dismissal unless coupled with some related misbehavior. Despite this major advance in employment rights, many courts were able to avoid the Morrison criteria for a few years because the parties were still being brought into the dispute through arrests for criminal sexual activity. By 1973, however Morrison was firmly established as one of the strongest statements in favor of an individual's right to retain employment despite a wide variety of personal indiscretions.

In 1973, and until about 1977, the effects of the "sexual revolution" and the legal emphasis on personal freedom, privacy, and minority rights combined with the increasing political effectiveness of the lesbian and gay rights movement to alter the character of homosexual school

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[20] Neal, Bradshaw, and Poston (1962).

teacher case law. In this period the typical case involved a male or female teacher who was exposed as a homosexual without criminal behavior, who admitted their homosexual orientation, and who challenged the school system's right to abridge their employment freedoms solely on the basis of homosexuality.[21] Litigants during this time period appealed to Federal courts, and asserted that their civil rights and constitutional freedoms were being denied by local prejudice. These lesbian and gay male teachers enjoyed the financial and emotional support of special interest groups that advocated homosexual rights and/or the right of school teachers to personal freedoms. Unknown to most of us, for example, is the fact that during their 1974 annual national conference, the National Education Association amended their non-discrimination statement to include protection for "sexual preference." Thus, the NEA has been instrumental in funding homosexual school teacher litigation for its union

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[21] In Acanfora v. Board of Education of Montgomery County, 359 F.Supp. 834 (1973), 491 F.2d 498 (1974), Cert. denied, 419 U.S. 839 (1974); Burton v. Cascade School District, 353 F.Supp. 254 (1973), 512 F.2d 850 (1975), Cert. denied, 423 U.S. 859 (1975); Gaylord v. Tacoma School District No. 10, 85 Wn.2d 348, 88 Wash.2d 286, 559 P.2d 1340 (1977), Cert. denied (1977); Aumiller v. University of Delaware 434 F.Supp. 1273 (1977); and Gish v. Board of Education, 145 N.J. Super. 96, 366 A.2d 1337 (1976), Cert. denied (1977), the judiciary were presented with exemplary citizens and educators who also were comfortable with and political about their sexual orientation.

See Chapter Five of Harbeck, Personal Freedoms (1987) for a more extensive discussion of gender distinctions in the case law.

members to this day.[22]

Additionally, by 1973, several states had liberalized their laws concerning sex between consenting adults. Thus the criminal statutes that had previously served as the standard of immoral conduct sufficient for dismissal often were no longer available to local school authorities in homosexual teacher cases. The litigation of this period demonstrated growing support for the homosexual school teacher, although case outcomes were not consistent.

Possibly the best example of this increased support but failed outcome is Acanfora (1974). Expert witness testimony by psychiatrists and child development researchers convinced the judge that the role modeling influence of lesbian or gay teachers was minimal because a child's sexual orientation is probably determined by ages five or six. Furthermore, the judge made radical statements about the rights of homosexuals and of school teachers, as though the extension of doctrines like Equal Protection, privacy, and First Amendment freedoms to lesbians and gay men was the obvious outcome given the changes to individual and minority rights over the past decade. In conclusion, however, after finding constitutional infringements upon Acanfora's fundamental rights, the judge resolved the case in favor of

[22] Interview with National Education Association officials, Michael Simpson, Assistant to the General Counsel (5 March 1986), and Al Erickson, Manager of Governance and Policy Support (10 March 1986). See also 1974-75 Book of Resolutions adopted in Chicago (1974): 252.

the school board on the grounds that Acanfora lied about his political activities as a homosexual on his job application.

Since the case law of this time period is inconsistent, the most striking evidence of social acceptance may be the municipal and school board anti-discrimination ordinances passed in support of homosexuals in general, and homosexual school teachers in particular.[23] I would argue, however, that these policy changes were coat-tailed on the increasingly popular concepts of individual rights and minority freedoms, rather than grounded in mass public education and awareness about the nature and extent of homosexuality. With the lobbying efforts of a few individuals, major political rights were gained, although the evidence suggests that few persons took advantage of their existence. Thus, lesbians and gay men lulled into a false sense of social acceptance. Things were fairly comfortable, political organization seemed only marginally necessary, and we remained vulnerable to a shift in public sentiment.

Not surprisingly, in the face of these remarkable nationwide advances, a conservative backlash arose against homosexual rights during 1977 and 1978. An emergent political coalition, initially lead by former Miss America finalist Anita Bryant, was very successful in its efforts to

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[23] Ordinances were passed in such diverse communities as Washington, D.C., Palo Alto, CA, Wichita, KS, St. Paul, MN, Eugene, OR, and Dade County, FL.

repeal homosexual rights ordinances in Dade County, Florida; Eugene, Oregon; St. Paul, Minnesota; and Wichita, Kansas. Ms. Bryant's initial involvement in the controversy stemmed from four factors.[24] First, the Dade County "gay rights" ordinance was written in such a manner that it was conceivable that private schools would be barred from discriminating on the basis of sexual preference, while the public school system remained outside its restrictions. Second, Ms. Bryant's minister and her husband strongly urged her to use her notoriety to defeat the ordinance. Third, Ms. Bryant's publicity agent, Richard Shack, had asked her to tape radio endorsements for his wife, Ruth, who was running for county office. Once elected, and to the great embarrassment of Bryant, Shack introduced the widely popular "gay rights" ordinance for adoption. In order to save face, Bryant was mobilized although she admitted to having little knowledge about homosexuality at the time. And fourth, a major source of Bryant's emergent knowledge about homosexuality was a film that graphically linked it child pornography and violence. These factors, combined with Bryant's strong fundamentalist religious beliefs, provided the conservatives with a highly charismatic public figure who easily aroused support.

It may also be the case, however, that Bryant's repeal campaign tapped the urge by local citizens to vote on the

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[24] See Harbeck, Personal Freedoms, Chapter Nine.

issue of changing social values. During the late 1960's and early 1970's, social change concerning abortion, contraceptives, civil rights, control over education, prayer in the schools, and the war in Vietnam, for example, had all been largely determined by Federal judicial decisions and legislative action. Voting in opposition to sexual preference protections was one of the few opportunities for the average American to express his or her concern over these breaks with social tradition.

One major concern of this study was how the successful Bryant campaigns were introduced on a state-wide level in California, and later Oklahoma.[28] Apparently, during the Bryant ordinance battle in Florida, California Assembly Speaker Willie Brown, one of the most power legislators in the State, traveled to Dade County to express support for homosexual rights. Angered by the impression that Brown was speaking on behalf of all Californians, State Senator John Briggs and his Spanish-speaking wife flew to Miami to assist conservative efforts. Once there, Briggs and several fundamentalist ministers, realized the political potential of this highly emotional controversy. Bryant had raised extraordinary sums of money in a very short time, her stance rallied the sympathies of conservative Americans, and her

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[28] These questions were answered after extensive research through newspapers and articles, and a recent three-hour interview with former California State Senator John Briggs (January 1988).

subsequent victory heightened their sense of empowerment. Upon returning to California, Briggs decided to use the issues of homosexual school teachers and the death penalty as the emotional underpinnings of his campaign for governor.

In his Proposition Six, set for public vote in November of 1978, Briggs called for the firing of any school employee who was "advocating, soliciting, imposing, encouraging, or promoting of private or public homosexual activity directed at, or likely to come to the attention of schoolchildren and/or other employees."[26] Polls conducted in August of 1978 suggested that passage of the Initiative was assured.[27] It went down in defeat, however, in part because of opposition expressed by former governor, Ronald Reagan. In commenting on the Initiative, Reagan said that it had:

> ...the potential for real mischief .... Innocent lives could be ruined.... Whatever else it is, homosexuality is not a contagious disease like measles. Prevailing scientific opinion is that an individual's sexuality is determined at a very early age and that a child's teachers do not really influence this....[28]

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[26] See Harbeck, Personal Freedoms, Appendix C for a complete text of the Initiative.

[27] A Field poll showed the Initiative passing by a 61 to 31 percent margin. ("Poll Shows Californians Support Controversial Initiatives," Washington Post, 20 September 1978).

[28] "After Low-Key Campaigns, Comeback Is Seen For Gay Rights," Washington Post, 27 October 1978. See also, Ronnie Dugger, On Reagan, The Man and His Presidency, New York: McGraw (1983): 264, 559.

In conclusion, Reagan asserted that the Initiative would be too costly to enforce, promoted too much governmental involvement, and set the stage for blackmail of teachers by students and parents.[29] To this day, Briggs blames his defeat on Reagan's reliance on aides, his disinterest in legislative detail, and his deference to Nancy Reagan's apparent support of their homosexual friends in Hollywood.[30]

Briggs maintains that he lost interest in the homosexual teacher issue after the Initiative's defeat, but not before his office fulfilled the request of Oklahoma State Senator Mary Helm for copies of the legislation.[31] Politicized by their fondness for native-daughter and former Miss Oklahoma, Anita Bryant, the Oklahoma legislature unanimously passed the Briggs' proposal in 1978.[32] It seems

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[29] See Harbeck, Personal Freedoms, Chapter Ten.

[30] Briggs aides met with Ronald Reagan after the anti-Initiative speech was given in the hopes of changing his mind. Reagan seemed willing to do so after hearing arguments in favor of the Proposition, but expressed concern that he would need to check the matter out with Nancy Reagan first. A retraction was never issued. (Personal Interview with Briggs, January 1987.)

[31] Both State Senator Helm and the House sponsor, Representative Monk, were members of the John Birch Society, and active opponents of the Equal Rights Amendment. Helm may have been using the Bill to boost her failing bid for re-election.

[32] Oklahoma Stat. tit. 70, section 6-103.15 (A) (2). Additional research suggests that the Ku Klux Klan was very active in Oklahoma high schools during this time period. Grand Wizard David Duke publicly discussed recruitment efforts and school endorsed club meetings that focused on a hatred of Blacks, Catholics, homosexuals, and women. ("Klan Leader Affirms Oklahoma City High School

clear that many members of the Oklahoma judicial and legislative branches wanted to have a law on the books prohibiting school employees from "advocating, soliciting, or promoting homosexual activity" in order to deter homosexual conduct, and that they had little or no intention of enforcing the legislation. On the other hand, they expressed little concern over the "chilling effect" of a law that probably infringed upon Federal and state constitutional protections concerning freedoms of speech and association, and Equal Protection.

Through some extraordinary legal maneuvers, Oklahoma judges were successful in delaying direct challenges to the constitutionality of the law for several years.[33] Finally, in 1984, the United States Court of Appeals, Tenth Circuit, ruled that the law, as written, was unconstitutional. The State appealed to the United States Supreme Court, which in January of 1985 failed to reach a decision because of a 4 to

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Organizational Activity," Source Unknown; "KKK Head In UK On Recruiting Trip," Gaysweek, May 1977; "Klan Chapters Terrorize Gays In Oklahoma," Gay Community News, 11 February 1978; "Teens Turn To Klan To Combat Gays," Washington Star, 26 January 1978; and "High School Ku Klux Klan Terrorizes Gays In Oklahoma City," Gaysweek, 6 February 1978.)

Klan members also served as body guards for Anita Bryant during her numerous public appearances against the Dade County Homosexual Rights Ordinance. ("KKK 'Protects' Anita At Rally," Source Unknown, 23 July 1977.)

[33] For example, in initial legal proceedings the judge refused to permit anonymous plaintiffs, although this procedure has been affirmed by the Courts in situations where identified individuals might face potential harm, such as loss of employment or physical threats.

4 split vote during the illness of Justice Powell.[34] Thus, the lower court ruling was upheld, although there have been subsequent efforts to rewrite the law to withstand constitutional challenges.[35] Since the United States Supreme Court failed to rule on the issue in 1985, and given the increasingly conservative stance of the High Court, it is likely that any future consideration of this issue would be resolved in favor a State's right to make educational policy decisions for its citizens.

Future Prospects

Although the stance of the United States Supreme Court is not appealing to lesbian and gay rights advocates at this time, future prospects for lesbian and gay educators remain promising. Since 1979, there has been a significant shift in public/administrative attitudes towards homosexual teachers, which, if tested, might radically limit the extensive hiring and retention autonomy thus far enjoyed by school administrators. Additionally, until the early 1970's, the individual teacher bore the cost of litigation against the school board's retained counsel. Now school

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[34] National Gay Task Force v. Board of Education of the City of Oklahoma, State of Oklahoma, 729 Fed.2d 1270 (1984), 33 FEP 1009 (1982).

[35] In addition to Oklahoma and California, the states of North Carolina, Nevada, Texas, and Arkansas considered similar legislation. ("Bill Against Gay Teachers Withdrawn," Gay Community News, 20 July 1985; George Michaelson, "Teachers Under Fire In Nevada," Gay Community News, 5 May 1979; and, "Gay Rights Backlash Repeals Local Ordinances," Gay Community News, May 1978.)

officials fear the litigation costs in the face of special interest advocates for teacher's unions, minority and homosexual rights, and civil libertarian ideals. Homosexual teacher litigation since 1973 has become a very costly process involving often a decade of legal maneuvering without clear resolution. For example, the Ross case in Oregon, commenced in 1979 and was recently remanded to the lower courts for the third time by the State Supreme Court for an ongoing determination of the meaning of "immorality."[38]

Because of the complexities of the legal and social issues, and because of the seemingly limitless legal and financial resources on both sides, the courts appear to have tried to avoid a direct declaration concerning whether or not homosexuals have a constitutional right to teach school. As long as the judiciary chooses to avoid taking the initiative on this controversial issue, tremendous room is left for negotiation and education. School boards seem more than willing to look the other way with respect to a teacher's homosexual orientation unless some indiscretion has occurred, and they certainly seem to be more willing to

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[38] Frank Ross v. Springfield School District No. 19, 56 Ore.App. 197, 641 P.2d 600 (1982), 71 Ore.App. 111, 691 P.2d 509 (1984), 294 Ore. 357, 657 P.2d 188 (1982). Most recent decision of the Oregon State Supreme Court, 11 February 1986.

negotiate than to face the costly expense of litigation.[37]

Having just concluded that a person enjoys tremendous latitude in being "out" in a teaching situation, I would like to offer a disclaimer and some practical advice. My research would suggest that previously impassioned conservative foes of homosexual educators, like former California State Senator John Briggs, fundamentalist minister Jerry Falwell, and many school administrators, have come to believe that trying to fire a homosexual teacher is not worth the hassle unless some overt scandal or community outcry occurs.[38] The danger then, is less likely to be overt discrimination and job termination. There remains, however, the real possibility of insidious incidents relating to limited advancement, ungranted tenure, mundane duty assignments, and undesirable teaching loads. Assessment of the costs and benefits of being "out" remains an individual task, although it seems clear that gay and lesbian educators have many more options than our invisible presence would lead us to believe.

Somewhat ironically, possibly the major obstacle in gay and lesbian school teacher litigation today, is the fact that educators resign their position during a period of "coming out" or administrative conflict, and then wish to be

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[37] I refer the reader to the full text of this study in order to substantiate this conclusion.

[38] Briggs interview, January 1988.

rehired after further reflection. Some recent cases that have been portrayed in the gay press as teacher firings, have in fact been reinstatement attempts after voluntary resignations.[39] If one voluntarily relinquishes an interest in an employment right, the law is quite clear concerning the broad discretionary powers of any employer during the hiring process.

I urge the reader to review my entire analysis of the current state of homosexual teacher litigation before taking any personal or collective action, since there are several nuances in the case law that occur depending upon the extent of employment rights established by any given teacher and/or the age of the students involved. For example, as mentioned above, the power of school authorities is greatest during the employment selection process when any idiosyncratic, bureaucratic, or discriminatory reason could convince an education official that a person would not be a welcome addition to their teaching staff. As long as school authorities are able to give rational reasons for their actions when challenged, they usually prevail over an individual claiming prejudice or unfair employment

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[39] Probably the best example of this is the recent West Virginia case, Conway v. Hampshire County Board of Education, 352 S.E.2d 739 (1986). Rehearing denied, 17 February 1987.

practices.[40] Furthermore, it has been clearly established since the Acanfora case in 1973, that one cannot lie on an employment application in order to avoid potential discrimination, and that a school board's concern for young children might be reasonable, but that role modeling influences related to sexual preference were of no consequence after about age six. Thus, the early education teacher, the new applicant, and the non-tenured teacher face the highest risk of job discrimination, which is future complicated by their lack of access to union representation.[41]

In contrast, the case law on tenured teacher controversy demonstrates the power of contractual rights, union clout, and the opportunity to develop a history of professional excellence and community approval.[42] Additionally, despite all of the conflicting court opinions about teacher dismissal, it is very clear that credential revocation on the basis of homosexuality is a thing of the

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[40] See Acanfora, Rowland, Burton, Aumiller, and McConnell v. Anderson, 451 F.2d 193 (1971). Cert. denied, 405 U.S. 1046 (1972).

[41] In the Acanfora, Rowland, and Burton cases, for example, the court concluded that these non-tenured teachers' rights had been violated, yet none of them was permitted to regain his/her employment.

[42] See Jarvella v. Willoughby-Eastlake City School District Board of Education, 12 O.Misc. 288, 41 O.O.2d 423 (1967); Lish v. Anchorage School District, Superior Court, Alaska (1978); Amundsen v. State Board of Education, Civ. No. 37942, Cal. Ct. App. (1971); the two Iowa cases, and Neal, Bradshaw, and Poston (1963).

past. First, state boards of education now face a much higher burden of proof because of the Morrison nexus requirement between the misconduct and one's job responsibilities. This action acknowledges the severe consequences of completely revoking entitlement to a profession, especially when effective alternative forms of censure are available. Second, since 1975, numerous state legislatures have eliminated most of the situations that previously permitted immediate credential revocation. In fact, even persons found guilty of serious felonies, such as narcotics sales, have the right to petition for credential reinstatement after a period of rehabilitation. School officials seem to have abandon credential revocation as a procedurally complex maneuver that offers little likelihood of success.

In addition to case law analysis on the basis of hiring, tenured teacher dismissal, and credential revocation, two topics arise that warrant consideration -- sex with students, and the A.I.D.S. crisis (Acquired Immune Deficiency Syndrome). Up until 1986, it seemed conclusive that sexual involvement with students was grounds for immediate termination, at least as far as the homosexual school teacher was concerned. This process was traditionally carried out swiftly either through teacher resignation or the previous powers of school authorities to dismiss a teacher automatically for certain misconduct.

Since 1986, however, two Massachusetts cases have arisen that call this outcome into question. In both incidents, the male educators used their social and political connections and the "heterosexual privilege" provided by marriage and children, to shield themselves from involuntary job termination and the harsh potential of the criminal justice system.[43] The lenient outcomes in these cases may speak more to the benefits of being an affluent, educated, married, white male in the very political environment of Massachusetts politics, rather than to an extraordinary change of social perspective towards same-sex molestation of children by their teachers.

Possibly the A.I.D.S. controversy offers some more realistic insights into the current status of homosexual educators than do the sex with students cases. The major problem in generalizing about this aspect of the controversy, however, is that litigation takes several years to develop, and the A.I.D.S. crisis is a relatively recent phenomena that may not be clearly established in the case law analytical context. To my knowledge, the homosexual educator cases concerning A.I.D.S. have focused entirely the contagiousness of the disease, rather than on sexual preference concerns. Certainly if conservative administrators believed that a homosexual orientation was

[43] Francis J. Pilecki, former President of Westfield State College, Westfield, Massachusetts (1986-87), and the Buckingham, Browne and Nichols Academy scandal (1987).

sufficient grounds for dismissal, they would raise this argument in conjunction with illness considerations.[44] In the most notable case on the subject, Chalk's employers, the Orange County Department of Education, expressed regret at terminating Chalk's employment, but did so in order to have judicial clarification of their liability if a parent sued because a teacher known to have the A.I.D.S. virus had been permitted to remain in the classroom.[45] Once the court found in Chalk's favor, apparently school officials welcomed him back, in part because of his excellent employment record. If one of the most conservative school districts in the nation, led by one of the most vocal opponents of homosexual educators during the late 1970's, former State Secretary of Education Max Rafferty, welcomes a gay teacher with A.I.D.S. back to the classroom, certainly the times have indeed changed for lesbians and gay men who teach school.

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[44] In Rice v. Bloomer, Prince William County, Virginia (1986-88), attorneys for the school board knew of Rice's sexual orientation and tried only once to raise this issue at trial. Rice's attorney objected to the question, and the judge ruled that an answer was not relevant to the case. In a subsequent settlement arrangement, Rice agreed to resign from his teaching position in return for "generous" support payments until his death in April of 1988. It should be noted that the same school district welcomed an six year old HIV positive child into mainstream classes in December of 1987, without debate. (Personal correspondence, Rice's attorney, Kenneth E. Labowitz, 31 October 1988.)

[45] See Chalk v. U.S. District Court, 46 FEP 279 (9th Cir., 1988). See also Briggs Interview, January 1988.

Conclusion

Although this study has attempted to provide a broad analysis of the controversy over the employment of lesbians and gay men as school teachers, a tremendous amount of research remains to be done. Case law conflict highlights extraordinary moments of dispute, but attention must be given to the everyday incidents, decisions, and negotiations that resolve such a controversy for the average citizen. Does one choose not to enter the teaching profession, or remain in the closet and resign upon discovery? Is it safe to be "out" in the schools, and have our lesbian and gay colleagues experienced acceptance by employers, students, and parents? Is the negative, invisible history that we have been socialized to believe, the current reality in the face of increased personal freedom, minority rights, and the shear number of lesbians and gay men in America today?

I believe that our advances lie in education, not litigation. Several psychological studies have demonstrated that if a heterosexual individual knows a homosexual, then acceptance increases as stereotypical responses decrease.[46]

[46] Katy Butler, "Perils For Gays Fighting Briggs Initiative," San Francisco Chronicle, 26 August 1978. See also, R. Bowman, "Public Attitudes Toward Homosexuality In New Zealand," 9 International Review of Modern Sociology (1979): 229-238; B. Glasser and C. Owen, "Variations In Attitudes Toward Homosexuality," 11 (2) Cornell Journal of Social Relations (1976): 161-176; G. Hansen, "Measuring Prejudice Against Homosexuality (Homosexism) Among College Students," 117 Journal of Social Psychology (1982): 233-236; Jim Millham, Christopher San Miguel, and Richard Kellog, "A Factor-Analytic Conceptualization Of Attitudes

Similarly, my initial research on homosexual educators suggest that if one individual has the courage to reveal their sexual orientation to their employer in an honest and non-controversial manner, the climate of support and job security extends to the lesbians and gay men who elect to follow their lead. Community deference to the autonomy of school officials remains strong, so the most critical attitudinal response is that of building administrators.

As educators, we have both the opportunity and the obligation to incorporate the contributions of minority individuals into our curriculum. As is often the case, this new information not only enlightens, it empowers.

Toward Male And Female Homosexuals," 2 (1) Journal of Homosexuality (Fall 1976): 3-10; and, C. Weis and R. Dain, "Ego Development And Sex Attitudes In Heterosexual And Homosexual Men And Women," 8 (4) Archives of Sexual Behavior (1979): 341-356.